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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARIO TORRES, Defendant and Appellant.	B193766 (Los Angeles County Super. Ct. No. BA293474)

APPEAL from a judgment of the Superior Court of Los Angeles County, John L. Martinez, Judge. Affirmed.

Jerome McGuire, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Mario Torres appeals from the judgment entered following his convictions by jury[1] on count 1 – first degree robbery of an inhabited dwelling (Pen. Code, § 211) in concert (Pen. Code, § 213, subd. (a)(1)(A)) with firearm use (Pen. Code, § 12022.53, subd. (b)) and a finding that the offense was committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(4)) and count 2 – possession of a firearm by a felon (Pen. Code, § 12021). The court sentenced appellant to prison for a total unstayed term of 16 years to life. Appellant claims the trial court committed trial and sentencing errors. We affirm the judgment.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which as to the substantive offenses is not in dispute, established as follows. Wendy Arias had dated appellant when she was in high school but their relationship ended. She testified that two to three months before August 2004, the two began contacting each other again. Some years prior to 2004, appellant told Arias that appellant was a member of the 38th Street gang. Arias introduced appellant to Miguel Guerrero. The three socialized, and smoked marijuana at Arias's Los Angeles home. In July 2004, Arias let Guerrero stay with her in her home. About August 4, 2004, Arias borrowed $40 from appellant. In the meantime, Arias began suspecting Guerrero of theft so, on August 10, 2004, she told him to leave. Guerrero angrily left and told her to watch her back.

Arias testified that on August 11, 2004, appellant, Guerrero, and three women robbed Arias of $100 inside her home. Appellant (a convicted felon) used a gun during the robbery, and the robbers ransacked the home. Arias testified that one of the women, Elizabeth Vargas, had the number 38 tattooed on her neck. Arias denied that any conversation about drugs occurred.

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1 This was appellant's second trial. The first resulted in a hung jury.

Guerrero testified as follows. Based on the August 11, 2004 incident, Guerrero was convicted of robbery and sentenced to prison for eight years. Police showed Guerrero a photographic admonition form and a folder containing six photographs, including one later identified as depicting appellant. Concerning appellant's photograph, Guerrero wrote on the form, "'The person that I know as Mario, Chubby,'" '"[h]e threatened [Arias] and told her that . . . she could not sell drugs in his neighborhood. He had a gun. . . . He got it out and he threatened her. . . ." At the time of the trial, Guerrero was in prison.

Los Angeles Police Detective Juan Gonzalez testified as follows. Police arrested Guerrero on August 13, 2004. Gonzalez interviewed him three days later. During the interview, Guerrero indicated the following. Guerrero knew appellant through Arias. Appellant told Guerrero that appellant was a 38th Street gang member. On August 11, 2004, appellant asked Guerrero if Arias was selling drugs. Guerrero replied he did not know. Appellant said Guerrero was lying and they were going to collect rent. Rent was a payment which a person, selling drugs in a gang's territory without permission, made to the gang so the gang would not bother the person. Guerrero and appellant went to a place where 38th Street gang members congregated. The two met four males and four females, all of whom Guerrero assumed were 38th Street gang members. One of the eight had a 38th Street tattoo. The group conversed and decided they would go to Arias's house, collect rent, and take the drugs.

According to Gonzalez, Guerrero also indicated the following to Gonzalez. Appellant and some of the gang members went to Arias's house. Guerrero did not go voluntarily; appellant had threatened him. Guerrero, appellant, and three females entered Arias's house. Appellant told the females to get Arias and told Guerrero to look for cocaine. Guerrero looked in a bedroom closet but found no drugs.

During Gonzalez's interview of Guerrero, Guerrero said that appellant told Arias that appellant "already told her that she couldn't sell there without his permission, why was she taking him for a fool." Guerrero also told Gonzalez that Arias and appellant

disputed whether she was selling drugs and that Arias said '"Okay. Give [me] a second. Let me get out of . . . the bathroom . . . so I can tell you where the drugs are.'"

Los Angeles Police Officer Gerald Harden, a gang expert, testified that the 38th Street gang operated in the area of Arias's house. The parties stipulated that the 38th Street gang was a "criminal street gang" within the meaning of Penal Code section 186.22. Harden testified that one of the gang's primary activities was narcotics sales. Harden also testified concerning gang territory and that gangs would charge rent, which was essentially extortion. Gangs forced drug sellers within their territory to pay the gang members to avoid being robbed or having the drugs taken. The 38th Street gang paid to the Mexican Mafia a tax on the profits of the drug sales of the 38th Street gang. The Mexican Mafia operated from jails and prisons. Witnesses in gang cases were often afraid of testifying because they were afraid of the gang. A person imprisoned but not a 38th Street gang member faced retaliation from the Mexican Mafia if the person testified against a person who was possibly a 38th Street gang member.

Harden also testified concerning criteria for identifying persons as gang members. Based on Harden's training, experience, and conversations with officers, Harden opined at trial that appellant was a 38th Street gang member. In February 2003, appellant was being investigated for vandalism, namely, writing "38th Street" on a wall. Appellant had "38th Street" tattooed on the inside of his leg, as well as an "S" tattoo, indicating allegiance to the Mexican Mafia.[2] Harden further testified that Vargas was a 38th Street gang member, and Harden had contacted her in the past. Vargas was subject to a gang injunction and had a visible gang tattoo. She was convicted of home invasion robbery based on the present incident and was a member of the 38th Street gang at the time of the robbery.

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[2] The parties stipulated that appellant had these tattoos on August 11, 2004.

In response to a hypothetical question,[3] Harden opined that the home invasion robbery in this case would have been "committed for the benefit of or in association of the 38th Street gang[.]" (*Sic.*) The prosecutor asked what was the basis for Harden's opinion that "it benefits the gang[.]" Harden replied as follows. Based on his training and experience, his conversations with gang members, and his knowledge of how they acted, if a person not a member of the gang was selling narcotics in the gang's neighborhood, the person would have to have permission from the gang. If the person had permission to sell narcotics, the person would be taxed, which was also known as paying rent. If the person did not pay, the gang would take the money and narcotics. If the gang failed to take action, the gang's reputation and ability to intimidate would be diminished. To benefit the gang, the gang would enter a location and tax to insure that the gang received its money, and so that both the person the gang was robbing and people in the community would know that the gang was not to be opposed and taxes were to be paid. The taxing of drug dealers promoted the gang's control of the drug trade.

The prosecutor also asked how the crime would be "in association of a gang[.]" Harden replied that if a gang member, and several other persons who may or may not be gang members, were involved together in a home invasion robbery, "[t]hat's pretty obvious in itself, they're there to do it in association with the gang and doing business for the gang." The fact that no one called out things like "'38th Street'" or "'This is for the gang'" did not change Harden's opinion, especially since "'38th Street'" tattoos were visible on some of the participants. A victim might have known a defendant, but gang

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3 The predicate facts for the hypothetical question were as follows. There were the gunman and three young women, "one of them who's a known self-admitted member of the 38th Street gang, and she has tattoos on her arms, [that is,] '38th Street' showing her allegiance." The group went with another male, who was not a gang member, to the home of the gunman's friend, that is, the former girlfriend of the gunman, and charged her rent because the gunman believed she was selling drugs and was not a member of the 38th Street gang. The group went to the former girlfriend's house to look for drugs and/or charge the former girlfriend rent for selling drugs, the group entered and ransacked the home, took $100, and the young women assaulted the former girlfriend.

intimidation would prevent victims from testifying; therefore, there were many reluctant victims and witnesses. During cross-examination, Harden testified that there were about 300 to 350 members of the 38th Street gang, some of whom were in custody. Appellant presented no defense evidence.

CONTENTIONS

We will identify and discuss appellant's multiple contentions below.

DISCUSSION

1. *Sufficient Evidence Supported the Gang Allegation.*

a. *There Was Sufficient Evidence of the Requisite Conduct and Specific Intent.*

Appellant claims there was insufficient evidence to support the gang finding because there was insufficient evidence that the robbery was committed (1) for the benefit of, at the direction of, or in association with any criminal street gang and (2) with the specific intent to promote, further, or assist in any criminal conduct by gang members. We disagree.

There is no dispute as to the sufficiency of the evidence that appellant committed first degree robbery of an inhabited dwelling, in concert and with firearm use. The parties stipulated the 38th Street gang was a criminal street gang. We have recited pertinent testimony of Guerrero, Gonzalez, and Harden. Guerrero testified to the effect that he had written on the photograph admonition form that appellant had threatened Arias and had told her she could not sell drugs in appellant's neighborhood. Her home was in territory claimed by the 38th Street gang. Gonzalez testified in essence that Guerrero told him that appellant told Guerrero that appellant and Guerrero were going to extort from Arias a payment of money to the gang because she was selling drugs without gang permission. Guerrero and appellant went to a known gang hangout, solicited other gang members to help, and they all decided they would extort money and take drugs from Arias. Once inside Arias's residence, appellant told Arias that he had already told her she could not sell drugs there without his permission. Guerrero told Gonzalez that Arias said

‘“Give [me] a second. Let me get out of . . . the bathroom . . . so I can tell you where the drugs are.’”

Harden testified appellant and Vargas, two of the robbers, were 38th Street gang members, and one of the primary activities of the gang was drug sales. Harden also basically testified that the robbery was committed for the “benefit of or in association of the 38th Street gang,” and explained why that was so.

We conclude, based on all the evidence, that there was sufficient evidence to support the gang finding, including sufficient *evidence* that appellant committed the robbery “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” within the meaning of Penal Code section 186.22, subdivision (b)(4). (Cf. *People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206; *People v. Romero* (2006) 140 Cal.App.4th 15, 18-20 (*Romero*); *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198-1199.) The fact that there also may have been evidence that appellant committed the offenses motivated by a reason(s) unrelated to the issues presented by the Penal Code section 186.22, subdivision (b)(4) allegation does not compel a contrary conclusion. Neither does the prosecutor’s argument to the jury.

b. *The People Did Not Have To Prove the Robbery Was Done to Further Criminal Conduct Other Than the Charged Offense.*

Appellant, relying on *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099 (*Garcia*), effectively argues (1) "specific intent to promote, further, or assist in any criminal conduct by gang members" within the meaning of Penal Code section 186.22, subdivision (b)(4), means "specific intent to promote, further, or assist" in criminal conduct other than the current offense of which appellant stands convicted, and (2) there was insufficient evidence of the latter specific intent. However, *Garcia* has been criticized and, as federal appellate authority, is not binding on this court. (*People v. Hill* (2006) 142 Cal.App.4th 770, 774; *Romero*, *supra*, 140 Cal.App.4th at pp. 19-20.) We decline to follow *Garcia*.

c. *The Evidence Supporting the Gang Finding Was Not Rendered Insufficient Because of Alleged Uncorroborated Testimony by Guerrero.*

Appellant claims the evidence supporting the gang finding was insufficient because the evidence consisted only of uncorroborated testimony by Guerrero, an accomplice. We disagree.

(1) *Guerrero's Testimony Concerning the Gang Allegation Was Not Insufficient Under Penal Code Section 1111.*

(a) *Penal Code Section 1111 Did Not Require Corroboration.*

Appellant argues Guerrero was an accomplice; therefore, Penal Code section 1111[4] required corroboration of his testimony concerning the Penal Code section 186.22, subdivision (b)(4) gang allegation. We reject the argument.

The court in *People v. Maldonado* (1999) 72 Cal.App.4th 588 (*Maldonado*) faced a similar issue. A defendant claimed a firearm enhancement had to be stricken because the trial court failed to instruct the jury that an accomplice's testimony as to the enhancement required corroboration, and because there was no independent evidence that he personally had used a firearm. (*Id.* at p. 597.)

Maldonado stated, "Penal Code section 1111, requiring corroboration, applies by its terms to 'conviction' of an 'offense.' An enhancement for personal use of a firearm is not an 'offense,' and a true finding on an enhancement allegation is not a 'conviction.' (*People v. Morris* (1988) 46 Cal.3d 1, 16) ['Firearm enhancements, like special circumstances, are not substantive crimes']. We conclude, therefore, that accomplice corroboration was not required to prove the gun use allegation." (*Maldonado, supra*, 72 Cal.App.4th at p. 597.)

Maldonado later observed, "Accomplice testimony must be corroborated to avoid the evil of an accused being convicted solely on the testimony of a coperpetrator who has a motive to place all the blame on the accused. Independent evidence must therefore connect the accused to the commission of the substantive offense, '"in such a way as

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4 That section states, "A conviction can not [*sic.*] be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. [¶] An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

reasonably may satisfy a jury that the accomplice is telling the truth."' [Citation.] The independent evidence need not establish all the elements of the underlying offense; once the corroboration sufficiently establishes the accomplice's believability, the accomplice's evidence may establish many facts or details not related in the independent testimony.

"*We conclude, therefore, that the requirement of accomplice corroboration to convict on the underlying offense is all that Penal Code section 1111 requires*; even if a true finding of a gun use enhancement depends exclusively upon the testimony of an accomplice, the corroboration requirement has already satisfied the statutory purposes of establishing the credibility of the accomplice while connecting the particular defendant to the commission of the crime. Unless the defendant has been properly convicted of the underlying offense under corroborated accomplice testimony, the question of personal use of a firearm for enhancement purposes never arises. But when a defendant has already been found guilty of the underlying offense, the accomplice's credibility as to additional details of the crime, such as which participant used a gun, has at that point been supported by independent corroboration connecting the defendant to the commission of the crime. There is no reason why the trier of fact should not then believe the accomplice's evidence as to the detail of gun use without requiring further specific independent corroboration on that point." (*Maldonado, supra*, 72 Cal.App.4th at p. 598, italics added.)

Unlike the firearm enhancement at issue in *Maldonado*, Penal Code section 186.22, subdivision (b)(4), is not an enhancement but an alternate penalty provision. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900, fn. 6.) Nonetheless, appellant concedes *Maldonado* correctly recites the policy reasons why accomplice testimony must be corroborated. When an accomplice presents uncorroborated testimony, the testimony provides evidence of a motive to lie, without countervailing evidence sufficient to permit a trier of fact to infer that the accomplice is telling the truth. The policy underlying the corroboration requirement precludes a trier of fact from relying only upon such uncorroborated testimony to convict. But once accomplice testimony as to an offense is

corroborated, the trier of fact has not only evidence of a motive to lie, but the countervailing evidence that the accomplice is telling the truth, and the trier of fact is free to credit the latter evidence when considering the accomplice's testimony as it relates to an enhancement allegation or to, as here, a penalty allegation.

Guerrero's testimony as to the robbery was adequately corroborated; appellant does not claim otherwise. (See fn. 6.) As *Maldonado* observes, once corroboration sufficiently establishes an accomplice's believability, the accomplice's testimony may establish many facts or details not related in the independent testimony. We see no reason to exclude from those facts and details the facts and details about the gang penalty allegation at issue here.

We realize that alternate penalty provisions such as Penal Code section 186.22, subdivision (b)(4) can significantly increase a defendant's sentence. Penal Code section 1111 constitutes a legislative indication that certain accomplice testimony is insufficient and untrustworthy as a matter of law (see *People v. Guiuan* (1998) 18 Cal.4th 558, 566; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1132). The section was enacted in 1872, was amended only twice (the last time in 1915), and has remained unchanged despite numerous subsequent enactments of enhancement and alternate penalty provision legislation addressing varied and increasing aggravated criminal behavior. Section 186.22, subdivision (b)(4) does not, by its terms, contain an accomplice corroboration requirement.

As a matter of statutory construction, Penal Code section 1111, according to the plain meaning of its terms, applies to a "conviction" of an "offense." Penal Code section 186.22, subdivision (b)(4) does not proscribe an offense; instead, the subdivision is an alternate penalty provision, and a true finding on a subdivision (b)(4) penalty allegation is not a "conviction." (Cf. *Maldonado*, *supra*, 72 Cal.App.4th at p. 597.) We conclude that, even if the only evidence supporting the gang finding was uncorroborated accomplice testimony by Guerrero, that fact does not render said evidence insufficient to support the

finding, because there was no need to corroborate Guerrero's testimony concerning the gang allegation. (Cf. *Id.* at pp. 597-598.)

None of the cases cited by appellant, or his arguments, compel a contrary conclusion.[5] In particular, appellant argues *Maldonado* was a case in which, once the accomplice's testimony as to the offense was corroborated, there was no reason the trier of fact should not have believed the accomplice's testimony as to the detail of the gun use but, in the present case, there was every reason the jury could have believed that appellant robbed Arias, but not believed Guerrero's statements to police that the robbery was gang-related. However, as discussed, the issue is whether Guerrero's statements as to the gang allegation had to be corroborated. We have concluded they did not. Moreover, the fact that Guerrero's statements as to the robbery were corroborated provided a legally sufficient evidentiary basis, or reason, for the jury to believe his statements as to the gang allegation.

Further, *Maldonado* concluded that once the accomplice's testimony as to the offense was corroborated, the testimony was legally sufficient to permit the trier of fact to believe the testimony as it related to the facts and details of the offense. *Maldonado* did not hold that the testimony was legally sufficient for this purpose only when there was no conflicting evidence on the facts and details of the offense.

(b) *Any Corroboration Requirement Was Satisfied.*

Finally, even if Penal Code section 1111 required that Guerrero's testimony as to the gang allegation be corroborated, no error occurred. "To corroborate the testimony of an accomplice, the prosecution must present 'independent evidence,' that is, evidence that 'tends to connect the defendant with the crime charged' without aid or assistance from the accomplice's testimony. [Citation.] Corroborating evidence is sufficient if it tends to implicate the defendant and thus relates to some act or fact that is an element of

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5 This includes *People v. Felton* (2004) 122 Cal.App.4th 260, and *People v. Wynkoop* (1958) 165 Cal.App.2d 540, each of which involved accomplice issues relating only to offenses, and not to enhancements or penalty provisions.

the crime. [Citations.] '"[T]he corroborative evidence may be slight and entitled to little consideration when standing alone." [Citation.]' [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 562-563.) The corroborative evidence need not establish all the elements of the underlying offense. (*Maldonado, supra*, 72 Cal.App.4th at p. 598.)

Arias's testimony provided the following evidence. Prior to 2004, appellant told Arias that he was a member of the 38th Street gang. Appellant knew Guerrero. On August 10, 2004, Guerrero angrily left Arias's home and told her to watch her back. On August 11, 2004, appellant, Guerrero, and others robbed Arias. One of the robbers, Vargas, had the number 38 tattooed on her neck. Harden's testimony provided the following evidence. The 38th Street gang was a criminal street gang which operated in the area of Arias's home. The gang would extort money from drug dealers in the gang's territory. Appellant was a 38th Street gang member, and had "38th Street" tattooed on the inside of his leg. Vargas was a 38th Street gang member at the time of the present offense. The robbery, according to Harden, was "committed for the benefit of or in association of the 38th Street gang." Harden testified if a gang member, and several other persons who may or may not have been gang members, were involved together in a home invasion robbery, "that's pretty obvious in itself, they're there to do it in association with the gang and doing business for the gang."

Any required corroboration did not have to corroborate each "element" of the gang allegation. Even if Penal Code section 1111 required that Guerrero's testimony as to the gang allegation be corroborated, there was sufficient corroborating evidence in this case.

(2) *The Federal Constitution Did Not Require Corroboration of Guerrero's Testimony Concerning the Gang Allegation.*

(a) *No Apprendi or Blakely Violation Occurred.*

Appellant claims in his supplemental reply brief that federal due process and right to a jury trial principles articulated in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [147 L.Ed.2d 435, 120 S.Ct. 2348] (*Apprendi*) and *Blakely v. Washington* (2004) 542

U.S. 296 [159 L.Ed.2d 403, 124 S.Ct. 2531] (*Blakely*), required that Guerrero's testimony as to the gang allegation at issue be independently corroborated. We disagree.

"The accomplice testimony rule is not constitutionally based. Rather it was court created in the first instance. [Citation.]" (*In re Mitchell P*. (1978) 22 Cal.3d 946, 949.) The rule was later codified as Penal Code section 1111. (*Ibid*.) The accomplice testimony rule as it relates to offenses is not constitutionally based, and appellant cites no authority for the proposition that there is an independent obligation under the federal Constitution to apply the rule to a penalty provision.

(b) *No Equal Protection Violation Occurred.*

Appellant also claims that applying accomplice corroboration requirements to offenses but not penalty provisions denies him equal protection of the law. We reject the claim.

Again, appellant concedes *Maldonado* correctly recites the policy reasons why accomplice testimony must be corroborated. An accomplice whose testimony as to an offense is uncorroborated differs from an accomplice whose testimony is corroborated as to an offense but not, independently, as to a penalty provision such as the one at issue here. An accomplice's uncorroborated testimony as to an offense is, as a matter of law, untrustworthy and insufficient not merely to convict but to establish facts about the offense, since there is no evidentiary basis which can legally support an inference that the accomplice is telling the truth. An accomplice's testimony which is corroborated as to the offense but not a penalty provision is not, as a matter of law, untrustworthy and insufficient to convict, since there is an evidentiary basis which can legally support an inference that the accomplice is telling the truth, and that testimony also may be believed to establish facts about the offense (such as whether it was gang-related for purposes of Penal Code section 186.22, subdivision (b)(4)).

The above two accomplices are not similarly situated with respect to the issue of whether their testimony is, as a matter of law, untrustworthy and insufficient to establish the truth of the facts and details of an offense. "The first prerequisite to a meritorious

claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." (*In re Eric J.* (1979) 25 Cal.3d 522, 530.) Appellant has failed to make that showing. In any event, as previously discussed, Guerrero's accomplice testimony as to the gang allegation was adequately corroborated.

2. *The Trial Court Did Not Prejudicially Err by Failing to Instruct that Accomplice Testimony Must Be Corroborated and Viewed With Suspicion.*

a. *Pertinent Facts.*

The trial court did not give to the jury CALCRIM No. 335, which would have instructed the jury, inter alia, that the testimony of an accomplice must be supported by independent evidence that tends to connect the defendant to the commission of the crime, and an accomplice's statement or testimony should be viewed with caution.

The court gave to the jury CALCRIM No. 301, pertaining to a single witness's testimony. That instruction read: "Except for the testimony of Miguel Guerrero, an accomplice, defined as someone liable for the identical offense for which the defendant is on trial, which requires supporting evidence, the testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence."

b. *Analysis.*

Appellant claims the trial court erred by failing to give CALCRIM No. 335 or a similar instruction. We conclude otherwise.

To the extent appellant claims the alleged instructional error requires reversal of his convictions, the claim is unavailing. "A trial court's failure to instruct on accomplice liability under [Penal Code] section 1111 is harmless if there is sufficient corroborating evidence in the record. (*People v. Lewis* (2001) 26 Cal.4th 334, 370; see *People v. Felton*, *supra*, 122 Cal.App.4th at pp. 271-272.)

In the present case, as appellant concedes in his opening brief, Arias testified appellant robbed her. She testified he possessed a firearm. There is no real dispute that

Arias's testimony corroborated Guerrero's statements and/or testimony to the extent he said and/or testified that appellant robbed Arias and possessed a gun.[6] CALCRIM No. 301 instructed the jury that Guerrero's testimony required supporting evidence, and that the principle that the testimony of only one witness could prove any fact did not apply to his testimony. The jury was able to evaluate Guerrero's testimony in light of his admission that he had been convicted of robbery based on the present incident. The claimed instructional error was harmless.

To the extent appellant claims the alleged instructional error requires reversal of the gang finding, we reject that claim since, as previously discussed, the trial court was not required to instruct on accomplice corroboration principles except as they related to the substantive offense. (*Maldonado*, *supra*, 72 Cal.App.4th at pp. 597-598.) Even if Penal Code section 1111 required such instruction, the trial court's failure to so instruct was harmless, since CALCRIM No. 301 indicated that Guerrero's unsupported testimony alone was insufficient to prove a fact, and, as previously discussed, there was adequate corroboration. (Cf. *People v. Lewis, supra,* 26 Cal.4th at p. 370.) To the extent appellant's instructional claim is based on *Apprendi*, its progeny, or equal protection principles, we reject the claim for the reasons previously discussed.

3. *Appellant Was Not Denied Effective Assistance of Counsel*.

a. *Trial Counsel's Failure to Object to the Prosecutor's Alleged Argument Concerning the Specific Intent Element of the Gang Allegation Was Not Ineffective Assistance of Counsel.*

(1*) Pertinent Facts.*

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6 Appellant asserts in his opening brief "There may have been corroboration of Guerrero's testimony concerning the robbery, per se. Wendy Arias's testimony corroborated Guerrero's testimony that appellant, or another person named Mario Torres, committed the charged robberies." We also note that appellant, in his supplemental opening brief discussing accomplice issues and the gang finding, concedes "There was every reason that the jury could believe that appellant was guilty of robbing Wendy Arias. . . ."

Following jury argument, and during the final charge to the jury, the trial court gave CALCRIM No. 370, pertaining to motive.[7] The court also gave CALCRIM No. 1401, which instructed on the elements of the Penal Code section 186.22, subdivision (b)(4) allegation, including the element of specific intent.[8] Finally, the court gave CALCRIM No. 252, which instructed on the allegation and specific intent.[9] We will set forth additional facts where pertinent below.

(2) *Analysis.*

Appellant claims he received ineffective assistance of counsel when his trial counsel failed to object to the prosecutor's alleged misconduct in arguing to the jury that the prosecutor did not have to prove that appellant had "specific intent to promote, further, or assist in any criminal conduct by gang members" within the meaning of Penal Code section 186.22, subdivision (b)(4). In particular, appellant claims that the prosecutor erroneously argued that he (1) only had to prove that the robbery was committed in association with a criminal street gang, and (2) did not have to prove that appellant had the above quoted specific intent. We disagree.

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7 CALCRIM No. 370 stated, "The People are not required to prove that the defendant had a motive to commit any of the crimes charged. In reaching your verdict you may, however, consider whether the defendant had a motive. Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty."

8 CALCRIM No. 1401 provided, inter alia, "If you find the defendant guilty of the crime charged in Count 1, you must then decide whether the People have proved the additional allegation that the defendant committed that crime for the benefit of, at the direction of, or in association with a criminal street gang. [¶] To prove this allegation, the People must prove that: [¶] 1. The defendant committe[d] the crime for the benefit of, at the direction of, or in association with a criminal street gang; [¶] AND [¶] 2. The defendant intended to assist, further, or promote criminal conduct by gang members."

9 CALCRIM No. 252, which pertained to the union of act and intent, stated, in relevant part, "The following . . . allegations require specific intent . . . a crime committed for the benefit of or in association of [*sic*] a gang."

We have reviewed the pertinent portions of the prosecutor's arguments. Appellant did not object to the prosecutor's alleged misconduct in arguing that he did not have to prove the above quoted specific intent. The record sheds no light on why counsel failed to act in the manner challenged, and counsel was not asked for an explanation. Moreover, there appears to be several possible satisfactory explanations as to why trial counsel failed to object to the prosecutor's argument. First, the prosecutor, during jury argument, somewhat inaccurately referred, e.g., to committing robbery "for the benefit or in association *of* a gang." (Italics added.) However, the prosecutor never expressly argued that he had to prove only that appellant committed such a robbery. In particular, the prosecutor never expressly argued that he did not have to prove that appellant had the previously quoted specific intent.

Second, the prosecutor indicated during jury argument that he was presenting only summaries of the law, the jury instructions thoroughly set forth the law, and the jury should read and follow them. Counsel for both parties knew during jury argument that the court had proposed to give CALCRIM Nos. 252 and 1401 (which were in fact given), which instructed on specific intent.

Third, the prosecutor did argue that he did not have to prove motive. However, the prosecutor was correct. We note the court gave the motive instruction, CALCRIM No. 370, to the jury, and appellant does not claim the instruction was erroneous. Moreover, "[m]otive describes the reason a person chooses to commit a crime. The reason, however, is different from a required mental state such as intent . . . ." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 504.) This is equally applicable to distinguish motive and specific intent.

Further, fairly read, the prosecutor's argument was not that he did not have to prove specific intent, but that he did not have to prove appellant's motive for violating Penal Code section 186.22, subdivision (b)(4). In particular, the prosecutor argued he did not have to prove appellant's motive for extorting money, for the benefit of and in association with the gang, from Arias, who was selling narcotics. Appellant's trial

counsel reasonably could have concluded that the prosecutor's argument was not erroneous or misconduct; therefore, the record fails to demonstrate that appellant received ineffective assistance of counsel as a result of his trial counsel's failure to object to the challenged prosecutorial argument. (See *People v. Slaughter* (2002) 27 Cal.4th 1187, 1229; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.)

b. *Trial Counsel's Failure to Object to the Prosecutor's Argument that Arias and Guerrero Were Reluctant Witnesses Was Not Ineffective Assistance of Counsel.*

(1) *Pertinent Facts.*

As mentioned, Harden opined that appellant was a 38th Street gang member. Harden testified that the 38th Street gang paid to the Mexican Mafia a tax on the profits of drug sales, the Mexican Mafia operated from prisons, and witnesses in gang cases were often afraid of testifying against gang members and being labeled a snitch. Harden also testified that a person imprisoned but not a 38th Street gang member faced retaliation from the Mexican Mafia if the person testified against a 38th Street gang member. Harden further testified that a victim might know a defendant, but gang intimidation would prevent victims from testifying; therefore, there were many reluctant victims and witnesses.

During the People's opening argument, the prosecutor commented to the effect that witnesses sometimes made statements to police and recanted them at trial. The prosecutor then commented to the effect that Arias testified under fear of reprisal from members of the 38th Street gang. Shortly thereafter, the prosecutor argued that Guerrero, fearing reprisal, made statements to police, but at trial denied remembering what he told police. Similarly, during closing argument, the prosecutor reiterated that witnesses did not testify as to what had happened because they feared reprisal.

(2) *Analysis.*

Appellant argues he received ineffective assistance of counsel when his trial counsel failed to object to the prosecutor's alleged argument that Arias and Guerrero were reluctant to testify because they had been threatened. We have summarized above

the pertinent portions of the prosecutor's argument, and appellant failed to object to any argument that Arias and Guerrero were reluctant to testify because they had been threatened. However, the record sheds no light on why counsel failed to act in the manner challenged, and counsel was not asked for an explanation. Moreover, we cannot say on this record that there simply could be no satisfactory explanation.

In fact, the record suggests a reasonable explanation as to why appellant's counsel did not object. In the present case, the prosecutor did not argue that Arias and Guerrero had been threatened by anyone, much less by appellant, but only that they may have feared reprisal. The prosecutor's argument was fair comment on the evidence, and appellant's counsel reasonably might have refrained from objecting to the argument for that reason. No ineffective assistance of counsel occurred. None of appellant's arguments compel a contrary conclusion.

c. *Trial Counsel's Failure to Impeach Arias With Her Former Testimony Was Not Ineffective Assistance of Counsel.*

(1) *Pertinent Facts.*

During the first trial,[10] Arias testified during direct examination by the People that, during the robbery, appellant asked Arias, "'Where's my 40?'" Arias replied she did not have appellant's $40, but indicated if he had approached her differently, she might have been able to borrow it. During redirect examination during the first trial, Arias testified that appellant said he was upset because Arias had put Guerrero out of the house. Appellant referred to Guerrero as "homie."

During the second trial, appellant asked Arias during recross-examination whether she had testified that Guerrero "put [appellant] up to this[.]" Arias testified Guerrero was the only person she was angry with, and she was not angry with appellant. Arias then testified, "Yeah, [appellant] had let me borrow $40, but I didn't think that was an issue."

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10 See footnote 1.

(2) *Analysis.*

Appellant argues he received ineffective assistance of counsel when his trial counsel failed to impeach Arias's testimony at the second trial with the testimony she gave at the first trial. In particular, appellant observes that at the first trial, Arias testified that appellant asked "'Where's my 40?'" but, at the second trial, Arias testified that appellant let her borrow $40, and she did not think that that was an issue. Appellant also observes that at the first trial, Arias testified appellant said he was upset because Arias put Guerrero, whom appellant also referred to as a homie, out of the house, but at the second trial, she did not so testify.

It is true that appellant's trial counsel did not seek to impeach Arias as appellant argues his trial counsel should have. However, again, the record sheds no light on why counsel failed to act in the manner challenged, and counsel was not asked for an explanation. Moreover, we cannot say on this record that there simply could be no satisfactory explanation. Simply put, appellant's trial counsel reasonably could have concluded that (1) Arias's testimony at the first trial that appellant asked her "'Where's my 40?'" and (2) her testimony at the second trial that appellant let her borrow $40 and she did not think that that was an issue, did not present a contradiction either expressly or in effect. Similarly, appellant's trial counsel reasonably could have concluded that Arias's testimony at the first trial that appellant said he was upset because Arias put Guerrero out of the house was not inconsistent with her mere failure to repeat that testimony at the second trial.

Appellant's counsel reasonably could have refrained from seeking to impeach Arias as urged by appellant because appellant's counsel concluded the alleged contradictions were in fact no contradictions and did not constitute impeachment. No ineffective assistance of counsel occurred.

4. *No Prejudicial Prosecutorial Misconduct Occurred.*

a. *Pertinent Facts.*

During the People's direct examination of Arias, the prosecutor asked Arias,

"Were you selling narcotics – and we're prepared to grant you immunity." Appellant then posed an unspecified objection.

Later at sidebar, appellant argued that the prosecutor's comment in front of the jury was improper, because the prosecutor should have either granted Arias written immunity or provided her with a lawyer. The prosecutor indicated he would ask the question again and, if Arias answered no, he could move on. The prosecutor also indicated he had asked Arias during an interview with the detective if Arias sold drugs, she said no, and the prosecutor predicted her answer when she testified would be no. The prosecutor then indicated he would withdraw the question.[11]

During opening argument, the prosecutor urged appellant was a 38th Street gang member with a gang tattoo, and appellant committed the robbery, associated with other 38th Street gang members, and carried out crimes for the gang. The prosecutor commented he did not know whether Arias was selling drugs, whether she was selling drugs was not the issue, but if Arias was selling drugs, the jury should not conclude that a drug dealer could not be robbed. As mentioned, the prosecutor also suggested that appellant's motive in committing the robbery might have been to extort money from Arias because she was selling narcotics, or to retaliate because she had evicted Guerrero.

During jury argument, appellant argued that Arias had not been selling drugs in her house and, because she lived in the community, she knew that if she sold drugs she would need permission from the gang to do so. Appellant also commented that the only one who broke into Arias's house and who was looking for drugs was Guerrero. During closing argument, the prosecutor urged appellant committed a robbery and "went

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11 During the final charge to the jury, the court gave CALCRIM No. 222, which stated, in relevant part, "[n]othing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence. The attorneys' questions are significant only if they helped you to understand the witnesses' answers. Do not assume that something is true just because one of the attorneys asked a question that suggested it was true."

along . . . with these young ladies to victimize someone else in the neighborhood who they thought was dealing dope. . . ."

b. *Analysis.*

Appellant claims the prosecutor's question to Arias, and comment proposing to grant her immunity, were improper. However, the claim is unavailing. Appellant waived the issue by failing to object and request that the trial court admonish the jury. (Cf. *People v. Gionis* (1995) 9 Cal.4th 1196, 1215; *People v. Clark* (1993) 5 Cal.4th 950, 1016; *People v. Mincey* (1992) 2 Cal.4th 408, 471.) Similarly, by failing to object, appellant waived the issue of whether the question and comment denied appellant his right to due process. (Cf. *People v. Jackson* (1996) 13 Cal.4th 1164, 1242, fn. 20.)

As to the merits, we note appellant's counsel did not, as respondent suggests, expressly object to the prosecutor's question on the ground it suggested facts harmful to appellant and the prosecutor lacked a good faith belief that such facts (namely, that Arias was selling narcotics) existed (see *People v. Warren* (1988) 45 Cal.3d 471, 480). Instead, appellant objected to the prosecutor's comment, made in the presence of the jury, proposing to grant her immunity when instead, according to appellant, Arias should have been granted written immunity or provided with counsel.

In any event, there is no dispute that appellant committed robbery with firearm use, and possession of a firearm by a felon. The issue, therefore, is the impact, if any, of the inference that Arias was selling narcotics on the gang allegation. Leaving aside the challenged question to Arias and the related comment, we previously have concluded that Guerrero provided substantial corroborated evidence that Arias sold narcotics. The parties did not emphasize during jury argument that Arias was selling drugs; the prosecutor denied knowing whether Arias was selling drugs, and appellant denied that Arias was selling drugs.

Moreover, the fact, if true, that Arias was not selling narcotics did not preclude a true finding on the gang allegation, since the People argued appellant thought Arias was selling drugs. Even appellant conceded during jury argument that Guerrero was looking

for drugs. Arias never answered the prosecutor's question as to whether she was selling drugs. The court instructed the jury not to assume the truth of something suggested by an attorney's question. We conclude the alleged prosecutorial misconduct was not prejudicial. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705].)[12]

5. *The Trial Court Properly Imposed Sentence Pursuant to the Gang Finding.*

a. *Pertinent Facts.*

The preconviction probation report reflects, under "sentencing considerations," "Pursuant to . . . 186.22 (b)(1)(a) PC, . . . if the enhancement[] [is] admitted or found true, it is recommended that the court use the enhancement[]." The handwritten word "unusual?" is written above "186.22(b)(1)(a) PC." We note Penal Code section 186.22, subdivision (g), states, in relevant part, "Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section . . . in an *unusual* case where the interests of justice would best be served. . . . " (Italics added.)

The People, in their sentencing memorandum, argued that imposition of enhancements was mandatory. During sentencing on September 5, 2006, the People also argued that appellant should receive a life sentence, the court had no discretion to impose a different sentence, and the court would have to impose the life sentence under Penal Code "section 186.22 (b)(1) subdivision (b)(4)" (*sic*), unless the court found the sentence to be cruel and unusual punishment.

At the sentencing hearing, the court indicated it was aware of the probation report. The court sentenced appellant to prison on count 1 to an indeterminate term of life with a minimum term of 16 years (the sentence specified under Penal Code section 186.22, subdivision (b)(4)). The court stayed sentencing on count 2 pursuant to Penal Code section 654.

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12 In light of our previous analysis of appellant's claim, we reject his contention that prosecutorial misconduct and ineffective assistance of counsel denied appellant a fair trial.

b. *Analysis.*

Appellant claims the trial court did not understand its discretion to dismiss the Penal Code section 186.22, subdivision (b)(4) allegation. Appellant finds this discretionary power in Penal Code sections 186.22, subdivision (g) and 1385.[13] We reject appellant's claim for two reasons.

First, to the extent appellant argues Penal Code section 186.22, subdivision (g) permits the striking of a Penal Code section 186.22, subdivision (b)(4) allegation, the pertinent portion of Penal Code section 186.22, subdivision (g) applies to enhancements. Although Penal Code section 186.22, subdivision (b)(1) is an enhancement provision (*People v. Briceno* (2004) 34 Cal.4th 451, 460, fn. 7), subdivision (b)(4) is not an enhancement but an alternate penalty provision. (*Robert L. v. Superior Court, supra,* 30 Cal.4th at p. 900, fn. 6.) Any discretion to strike which the trial court had under Penal Code section 186.22, subdivision (g) is inapplicable here.

Second, the general rule is that a trial court is presumed to have been aware of, and to have followed, applicable law. (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496; Evid. Code, § 664.) An appellate court must presume that the decision of the trial court is

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13 Penal Code section 186.22, subdivision (g) provides, "Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition." Penal Code section 1385 provides, in relevant part, "(a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading. [¶] . . . [¶] (c)(1) If the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a). [¶] (2) This subdivision does not authorize the court to strike the additional punishment for any enhancement that cannot be stricken or dismissed pursuant to subdivision (a)."

correct, all intendments are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. (*Ibid*.) "The appellate court cannot presume error where the record does not establish on its face that the trial court misunderstood the scope of its discretion. [Citations.]" (*In re Jacob J*. (2005) 130 Cal.App.4th 429, 438.) The "general rules concerning the presumption of regularity of judicial exercises of discretion apply to sentencing issues. [Citations.]" (*People v. Mosley*, *supra*, 53 Cal.App.4th at p. 496)

In the present case, we must presume the trial court was aware of and considered any discretion it had to strike the Penal Code section 186.22, subdivision (b)(4) finding pursuant to sections 186.22, subdivision (g) and 1385. We cannot automatically charge any prosecutorial error to the trial court. The court was aware that the prosecutor cited no authority for the proposition that the court lacked discretion to strike the finding. The court did not expressly agree with the prosecutor that the court lacked discretion to strike the finding.

In fact, as noted, there were handwritten notations in the probation report, including the handwritten notation "unusual?" above the reference in the report to "186.22(b)(1)(a) PC." The trial court is presumed to have known it was sentencing appellant pursuant to Penal Code section 186.22, subdivision (b)(4). The court did not impose a Penal Code section 186.22, subdivision (b)(1) enhancement. The handwritten word "unusual?" above the reference in the report to "186.22(b)(1)(a) PC," considered in light of section 186.22, subdivision (g)'s language permitting a trial court to strike a section 186.22 enhancement, provides affirmative evidence suggesting the trial court made the notations and specifically considered whether to strike the section 186.22, subdivision (b)(4) allegation pursuant to any discretionary power it had under subdivision (g). The record does not establish on its face that the trial court misunderstood its discretion, nor does the record establish facts rebutting the presumption of regularity of judicial exercises of sentencing discretion. Appellant's claim fails.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.